

October 25, 2011

Jennifer J. Johnson
Email: regs.comments@federalreserve.gov
Secretary, Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue, NW.
Washington, DC 20551

Via Email

Attention: Docket No: R-1429; RIN No.: 7100 AD 80

RE: August 11, 2011 Interim Final Rule: Provisions of Regulation MM Restricting Dividend Waivers by Grandfathered Mutual Holding Companies

Dear Ms. Johnson:

This firm represents mutual thrift holding companies that for decades have waived their right to receive dividends. We believe that the Federal Reserve's rule regarding dividend waivers in Section 239.8 of Regulation MM exceeds the authority granted in Section 625 of Dodd-Frank.

1. The OTS Dividend Waiver Rule

Under the OTS's Mutual Holding Company Regulations, the OTS would not object to a dividend waiver if: (i) the waiver would not be detrimental to the safe and sound operation of the savings association; and (ii) the mutual holding company board of directors expressly determines that dividend waiver is consistent with the directors' fiduciary duties to the mutual members of the holding company. 12 C.F.R. 575.11(d)(2) (2010). The OTS required that the dividend waiver notice include a copy of the resolution of the mutual holding company board of directors, in form and substance satisfactory to the OTS, together with any supporting materials relied upon by the board concluding that the proposed dividend waiver is consistent with the board's fiduciary duties. *Id.* If these conditions were met, the OTS would not object to the dividend waiver. The OTS did not require a vote of all mutual members approving the dividend waiver.

2. Codification of the OTS Rule for Grandfathered MHCs

As part of the consolidation of the OTS into the Federal Reserve, Congress explicitly addressed the treatment of dividend waivers for Grandfathered Mutual Holding Companies ("Grandfathered MHC's"). Grandfathered MHC's are those that, prior to December 1, 2009, 1) reorganized into an MHC; 2) issued minority stock from either its mid-tier stock holding company or its subsidiary stock savings association; and 3) waived dividends from the subsidiary stock savings association. Dodd-Frank Act, Section 625. For Grandfathered MHC's, The Dodd-Frank Act codified the OTS rule on dividend waivers; the language in Dodd-Frank on the

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standards for waiver of dividends is exactly the same as the OTS dividend waiver rules. For Grandfathered MHC's, the Dodd-Frank Act states that the Federal Reserve "*may not* object to a waiver of dividends" if the two conditions previously imposed by the OTS are met (not detrimental to safety and soundness and a determination by the MHC board that waiver is consistent with its fiduciary duties) (emphasis added).

3. The Provision of Regulation MM Requiring a Vote Exceeds Congressional Authority

Despite this directive from Congress, Section 239.8(d) of Regulation MM requires a vote of the MHC mutual members approving the dividend waiver in the previous 12 months. 12 C.F.R. 239.8(d)(2)(iv). This requirement is not in the statute and was not in the OTS rules which the statute codifies. The statute simply does not give the Federal Reserve the authority to promulgate a new requirement for Grandfathered MHC dividend waivers. To the contrary, as stated above, the Dodd-Frank Act explicitly prohibits the Federal Reserve from objecting to a dividend waiver notice by a Grandfathered MHC if the two requirements previously required by the OTS are met. Requiring a vote of the MHC mutual members violates this prohibition and exceeds the Federal Reserve's authority under Dodd-Frank.

4. Requiring a Vote is Beyond the Federal Reserve's Authority Over the "Form and Substance" of the MHC Board Resolution

Contrary to Dodd-Frank, the rule seems to be an attempt to leverage the Federal Reserve's discretionary authority over the form and substance of the required MHC board resolution. Section 625 of Dodd-Frank gives the Federal Reserve the authority to determine the "form and substance of the resolution" to be included in the MHC's waiver notice. The OTS rule gave the OTS the exact same authority. The Federal Reserve's rule places the mutual member vote requirement within this section, stating that the resolution must contain an "affirmation" that a majority of the mutual members voted to approve the dividend waiver within the 12 months prior to the dividend declaration date. This attempted leveraging of authority over the "form and substance" of the resolution into an additional requirement transgresses the statutory directive given to the Federal Reserve. Requiring a vote is a separate substantive and procedural requirement, not a part of the "form and substance" of the resolution. To interpret "form and substance" so broadly would allow the Federal Reserve to add any requirement through an affirmation in the MHC board resolution, even one that is tantamount to the disallowance of dividend waivers. This was clearly not Congress's intention.

5. Requiring a Vote is Contrary to Congressional Intent

If Congress intended to require a vote of the members for a dividend waiver it would have done so in the statute under the heading "Standards For Waiver of Dividend." It did not. The express language of the statute strips the Federal Reserve's power to object if the conditions are met as opposed to providing conditions that must be met at the Federal Reserve's discretion. It is a non-disapproval review process like that employed for MHC reorganizations and notices under the Change in Bank Control Act. 12 C.F.R. 575.3; 12 U.S.C. 1817(j). Under Section 625 of Dodd-Frank, if a Grandfathered MHC's dividend waiver is not detrimental to the safe and sound

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operation of the institution, and the MHC board determines that the waiver is consistent with its fiduciary duties, *then the Federal Reserve may not object*. Under the Federal Reserve's rule, even though those two conditions are met, the Federal Reserve could object if the mutual members have not approved the dividend waiver by vote. This is in direct conflict with the statutory language.

6. The Board of Directors of Grandfathered MHCs Should Retain Discretion Over The Exercise of Their Fiduciary Duties

In the Rulemaking, the Federal Reserve Board attempts to justify the member vote requirement, stating: "[t]o address the concern with respect to the inherent conflict of interest created by the waiver of dividends section 239.8(d)(3) requires that the resolution of the MHC's board of directors contain certain elements," including an affirmation that the mutual members approved the waiver. The statute, however, makes no mention of an inherent conflict of interest. It only indirectly refers to a conflict of interest by requiring the MHC board to determine that the waiver is consistent with their fiduciary duties. That is how the OTS Rule, codified by Dodd-Frank, dealt with any conflict of interest. *See* 63 Fed. Reg. 11361 (March 9, 1998).

By requiring a vote, the Federal Reserve is overriding this statutory directive and replacing it with its own policy, which has been to disallow dividend waivers because of the conflict of interest that it perceives. Section 625 of the Dodd-Frank Act, however, places the onus of determining the consistency with fiduciary duties on the MHC board of directors, not on the Federal Reserve. If the MHC board of directors determines that waiving dividends benefits the mutual holders by strengthening the institution, and that this benefit outweighs the retention of the dividends, then the Federal Reserve may not object. No provision of Dodd-Frank gives the Federal Reserve the power to preemptively override the MHC board's determination of its fiduciary duties. By requiring a vote of the mutual members, the Board is implementing its policy that a dividend waiver is a de facto conflict of interest that requires ratification of the members. The discretion to implement this policy is not in the statute.

7. Dividend Waivers Can Serve as a Source of Strength


This discretion is not in the statute because Congress's clear intent was to maintain Grandfathered MHC's access to capital markets, which has historically served as a significant source of strength. The OTS rule, and Section 625 of the Dodd-Frank Act, leave the determination of consistency with fiduciary duties to the MHC board because dividend waivers can, in fact, strengthen the institution and be consistent with the board's fiduciary duties without member ratification. Capital sources for smaller institutions are inherently limited when compared to large publicly traded stock companies. The dividend waiver serves as a particular source of strength for financial institutions with mutual and stock ownership. It provides a mechanism which facilitates the attraction of capital through the enhanced dividend payment potential. This capital strengthens the bank and its depositors (the mutual interest holders) in both good and troubled times. The legislative intent to provide MHC's with access to capital markets is proved by 12 U.S.C. 1467a(o)(8)(A), entitled "Capital improvement," which authorizes MHC's to sell minority interests in their voting stock. The ability to waive dividends, if the MHC board determines it is consistent with its fiduciary duties, buttresses this provision.

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We respectfully submit this comment for your consideration and request that the Federal Reserve Board eliminate the requirement of an annual vote of the mutual members in order for a Grandfathered MHC to waive dividends. If you have any questions do not hesitate to contact myself at the phone and email provided above, or Howard Hagen at (515) 246-4543, hhagen@dickinsonlaw.com.

Very truly yours,



Jeffrey J. Andersen, and



Howard O. Hagen